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Inc. and USF&G, Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA for the use of
NORTH STAR TERMINAL & STEVEDORE
COMPANY, d/b/a NORTHERN STEVEDORING
& HANDLING, and NORTH STAR TERMINAL &
STEVEDORING COMPANY, d/b/a Northern
Stevedoring & Handling, on its own behalf,

Plaintiff,

and

UNITED STATE OF AMERICA for the use of
SHORESIDE PETROLEUM INC., d/b/a Marathon
Fuel Service, and SHORESIDE PETROLEUM
INC., d/b/a Marathon Fuel Service, on its own
behalf,

Intervening Plaintiffs,

and

METCO, INC.,

Intervening Plaintiff,

vs.

NUGGET CONSTRUCTION INC.; SPENCER
ROCK PRODUCTS INC.; UNITED STATES
FIDELITY AND GUARANTY COMPANY; and
ROBERT A. LAPORE,

Defendants.

No. 3:98-cv-00009-TMB

**NUGGET'S TRIAL BRIEF
AND MEMORANDUM IN
SUPPORT OF OBJECTIONS
TO NORTH STAR'S
PROPOSED JURY
INSTRUCTIONS**

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I. INTRODUCTION

In May and June 1997, pursuant to an express contract with Spencer Rock Products, Plaintiff North Star loaded rock onto a barge supplied by Nugget Construction for transport to Homer. North Star's work entailed five separate loadings of the barge over those two months. The rock was for incorporation into a revetment project Nugget was constructing for the Army Corps of Engineers. Nugget's project manager, Randy Randolph, was present in each instance for the loading of the barge to insure that the rock was properly placed on the barge. Mr. Randolph also worked with North Star to facilitate the arrival and load dates of the barge shipments. This is the only contact Nugget had with North Star during the period of North Star's performance on the project, and North Star (Jack Goodwill) admits Mr. Randolph's actions were typical of a vessel representative.

Because there is no basis upon which North Star can legitimately claim, much less prove, a direct contractual relationship between it and Nugget, and because the Ninth Circuit has determined that North Star is not covered under the Miller Act, North Star is left with having to establish that Spencer Rock's existence in the chain of privity is a charade embarked upon by Nugget and Spencer Rock for the purpose of insulating Nugget from Miller Act liability, or for some other improper purpose. *Fidelity & Deposit Co. of Md. V. Harris*, 360 F.2d 402, 410 (9th Cir. 1966). Otherwise, all of North Star's contractual (either federal or state) and/or equitable claims must fail.

Other than North Star's tort claim for interference with a contract, all other claims remaining in this litigation turn on the question of the nature and degree of Nugget's alleged control over Spencer Rock products. This is the law of the case as established by the Ninth Circuit's 2001 and 2005 decisions, this court's decision disposing of Nugget's motion for summary judgment on all of North Star's state law claims (Docket

1 No. 636), and in North Star's own statement of the issues left for trial in the Draft Pre-
2 Trial Order (Docket No. 736).

3 However, despite this issue being the only substantive one before the court for
4 the jury's consideration, North Star appears determined to continue arguing its case
5 based on what was alleged in its complaint, rather than what has been decided in the
6 interim. North Star's approach is apparent in the form of jury instructions it presented to
7 Nugget for discussion and deliberation. Rather than acknowledge the common element
8 tying together all of its contractual claims, North Star continues to try and parse each
9 cause of action into separate instructions without reference to the necessity of finding
10 an improper relationship between Nugget and Spencer as a precursor to any of those
11 claims.

12 Primarily based on its reading of the court's July 28, 2006 Order Disposing of
13 Parties' State Law Summary Judgment Motions (Docket No. 636), Nugget's position is
14 that there are essentially only two basic instructions necessary to provide the jury with
15 the correct law to decide the non-tort claims in this case: (1) one containing the federal
16 law reflecting the standards for establishing Spencer Rock as a strawman in the chain
17 of privity (Nugget's Proposed Jury Instruction No. 30); and (2) the other setting forth the
18 state law regarding under what circumstances Nugget's alleged usurpation of Spencer
19 Rock makes Nugget responsible to North Star for Spencer Rock's debt (Nugget's
20 Proposed Jury Instruction No. 25). If, and only if, North Star prevails under either of
21 these propositions, it prevails against Nugget. North Star's attempts to separately set
22 out instructions for unjust enrichment, quasi-contract, quantum meruit, etc. is
23 superfluous (North Star's Proposed Jury Instruction Nos. 31, 32, 33, 34, 35, and 36) and
24 does not accurately reflect the law as previously established by the court, as each of its
25 instructions ignores the relationship that must be found to be improper.

Put another way, despite North Star's attempts to "cover its bases" by including numerous separate causes of actions in its amended complaint, this case boils down to an all or nothing proposition – either the jury finds Nugget's actions sufficient to ignore Spencer Rock's presence or North Star loses. Similarly, with regard to North Star's tort claim, if the jury finds Nugget's actions in its dealing with Spencer Rock and North Star justified, North Star's tortious interference with contract claim must also fail.

II. LEGAL ISSUES IN DISPUTE

A. The Law of the Case

In its order disposing of the parties' competing motions for summary judgment on the state law claims, the court set forth the law of this case dealing with each of the claims that survived summary judgment. It is important to revisit the court's approach to those claims to fully understand Nugget's position with respect to why North's Star's proffered jury instructions do not reflect the realities of this case. In denying Nugget's motion for summary judgment, the court relied on the following disputed element with respect to each of the remaining claims:

Express Contract/Agency:

When read in context, the Ninth Circuit holding upon which Defendants' rely is simply that Plaintiffs never expressly contracted directly with Nugget. Plaintiffs' contention, however, is that Spencer became an agent or extension of Nugget, and thus assumed Spencer's express contractual obligations to third parties, including to Plaintiffs. Although the issue appears not to have been directly addressed by the Alaska Supreme Court, Alaska law, following the Restatement (Second) of Agency, holds that an undisclosed principal is generally liable to third parties with which its agent contracts. **Thus, the viability of Plaintiffs express contract claim against Nugget depends upon Nugget's relationship with Spencer. ... Here, material facts necessary to determine the existence of an agency relationship, namely the extent to which Nugget assumed control over Spencer, are in dispute.**

1 **Implied-in-Fact Contract:**

2 Under Alaska law, “[a]n ‘implied in fact’ contract is grounded on the
3 intention of the parties to form a contract; the parties’ assent thereto,
4 although unarticulated, is inferred from the surrounding facts and
5 circumstances.” ... **Material issues of fact remain in dispute as to (i)**
6 **the collusion between Nugget and Spencer and (ii) Nugget’s direct**
7 **interactions with Plaintiffs.**

8 **Tortious Interference:**

9 Material issues of fact surround the remaining two elements of North
10 Star’s tortious interference claim, namely whether Nugget’s conduct
11 caused Spencer’s breach and whether Nugget’s actions were privileged or
12 justified. Ninth Circuit Opinion at 6. **Both of these elements depend**
13 **upon the extent of the alleged subterfuge and collusion between**
14 **Nugget and Spencer.**

15 **Unjust Enrichment, Quasi-Contract and Quantum Meruit:**

16 The parties agree that Alaska law treats claims of unjust enrichment,
17 quasi-contract and quantum meruit claims similarly. ... Each of the
18 elements that make up the claims – Nugget’s receipt of a benefit, Nugget’s
19 appreciation of that benefit, and the inequity of allowing Nugget to retain
20 the benefit – depend upon the relationship between Nugget and Spencer.
21 **The nature of that relationship, in turn, depends upon the extent of**
22 **the alleged subterfuge and collusion between Nugget and Spencer.**

23 **Equitable Subordination and Constructive Trust:**

24 Equitable subordination, whereby a court alters the pre-existing priorities
25 among creditors, has been recognized in Alaska to apply outside of the
bankruptcy context in situations of “fraud, unfairness, or breach of the
rules of ‘fair play.’” ... “In Alaska a constructive trust is appropriate to
prevent unjust enrichment, defined as the retention of a property through
unjust, unconscionable, or unlawful means.” ... **Resolution of the**
claims depends upon the disputed material issues of fact
surrounding the extent of the alleged subterfuge and collusion
between Nugget and Spencer.

(Emphasis added and internal citations omitted.)

1 In North Star's statements relating to its claims and disputed facts set forth in the
2 Draft Pre-Trial Order (Docket No. 736, erroneous titled "Trial Brief"), it acknowledges, in
3 part, the limitations placed on these causes of actions in the court's summary judgment
4 order. In the Draft Pre-Trial Order, North Star states that its Miller Act, Express
5 Contract, Agency, Implied-in-Fact Contract, Unjust Enrichment, Quasi Contract, and
6 Quantum Meruit claims all turn on the issue of control between Nugget and Spencer.
7 Although North Star fails to recognize the court's position on the Equitable Subrogation
8 and Constructive Trust Claims, there can be no dispute that the court has already
9 determined that these claims rest on the relationship question. Finally, in its statement
10 of disputed facts, North claims that "[t]he issues of fact to be determined are the manner
11 and extent to which Nugget took control of Spencer Rock Products and all of the facts
12 relating to Nugget's actions and inactions."

13 **B. Bendix Corp. v. Adams**

14 In addition to the dispute regarding whether all of the "subjective" contract claims
15 can be distilled into a single instruction focused on the question of Nugget's alleged
16 control over Spencer Rock, there is significant dispute as to the scope of the
17 instruction(s) required for the Express Contract/Agency claim. North Star's proffered
18 instructions are based on the supposition that, for want of a better term, there was an
19 "express" agency relationship between Nugget and Spencer Rock (North Star's
20 Proposed Jury Instruction Nos. 25, 26, and 27). However, there is no evidence in the
21 record that Nugget and Spencer Rock ever intended to enter into an agency
22 relationship, in which Spencer Rock was overtly acting as an agent on Nugget's behalf
23 with regard to Spencer Rock's interactions with third-parties. Instead, the allegation in
24 this case is that the actions of Nugget with respect to Spencer Rock were such that
25 Nugget essentially took control of Spencer Rock's operations, and thereby, stepped into

1 Spencer Rock's shoes. This concept requires an entirely different instruction to the jury
2 than the standard *respondeat superior*/agency instructions offered by North Star. The
3 law in Alaska applicable to the circumstances presented by this case is found in the
4 case of *Bendix Corp. v. Adams*, 610 P.2d 24 (Alaska 1980). See Nugget's Proposed
5 Jury Instruction No. 25.

6 In *Bendix*, the plaintiff, Adams Barge Company ("Adams"), had entered into a
7 contract with a former subsidiary of Bendix Corp., Marine Advisers, Inc. Adams had
8 brought suit against Bendix for tortious interference¹ with the Adams – Marine Advisers
9 contract and for breach of contract on the theory that Marine Advisers was acting as
10 Bendix's agent. On appeal, there was no dispute that there was a valid agreement
11 between Marine Advisers and Adams, or that Marine Advisors had breached that
12 agreement. The only question on the charge of agency was whether Bendix had
13 sufficient control over Marine Advisors to create an implied agency relationship. This is
14 referred to by the court as the "instrumentality theory" of responsibility. The
15 instrumentality theory necessarily became the basis of the claim, because there was no
16 evidence of an "express" agency relationship between Bendix and Marine Advisers. *Id.*
17 at 33. The same argument is essentially being made by North Star – Spencer Rock
18 became a mere instrumentality of Nugget's during the course of performance.

19 Although Spencer Rock was not a subsidiary of Nugget's, and there was no other
20 legal relationship between them except for the ones contractually created, North Star's
21 claims against Nugget are akin to an attempt to pierce the corporate veil if Spencer
22 Rock was legally related to Nugget. The effect of both theories is to eliminate the
23 middle entity in the chain of privity to allow the plaintiff to recover against the
24 "controlling" entity. In essence, North Star's claim is that Nugget took control over
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1 Spencer as if it was not an independent legal entity, which is the same criterion that
2 provides for a plaintiff to disregard the corporate structure of a subsidiary and go directly
3 against the parent company.

4 However, the *Bendix* court found that for the parent to be responsible for the
5 actions of the disregarded entity, the relationship must have been created to “defeat
6 public convenience, justify wrong, commit fraud, or defend crime.” *Id.*, at 32 (quoting
7 *Jackson v. General Electric Co.*, 514 P.2d 1170, 1172-73 (Alaska 1973)). In the
8 subsidiary context, the court holds that “piercing the corporate veil ‘requires
9 considerably more than mere control; it exists to prevent a party from obtaining an
10 advantage through deceptive or manipulative practices.’” *Id.* (quoting *Elliott v. Brown*,
11 569 P.2d 1323 (Alaska 1977)).

12 Even the case primarily relied upon by North Star to support its “control” agency
13 theory, *A.Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1982), is little
14 more than an “instrumentality” case. In that case, Cargill had assumed almost exclusive
15 financial control of the agent’s business over the period of many years. The level of
16 control was so great that the court found that the agent was no longer acting as an
17 independent entity – it had been defacto absorbed by Cargill. *Id.*, at 290-93. Thus,
18 Cargill was essentially using the agent as if it was a wholly owned subsidiary, such that
19 it was appropriate to “pierce” through the relationship and find Cargill directly liable to
20 the agent’s other debtors. It is important to first note that the actions undertaken by
21 Cargill from 1964-1977 are wholly distinguishable, in breadth and in kind, from Nugget’s
22 attempts to support Spencer Rock’s performance of a single material supply contract.
23 In fact, Nugget’s relationship with Spencer Rock falls squarely within the exception for a
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25 ¹ The case also provides the legal foundation for Nugget’s justification defense regarding the alleged
tortious interference claim. *Bendix*, at 29-32.

1 buyer-supply enterprise discussed in the *Cargill* case. *Id.*, at 291-92 (citing
2 Restatement (Second) of Agency § 14K).

3 Regardless of the factual issues that may be disputed regarding whether
4 Nugget's actions rise to the level of Cargill's to create an agency relationship under the
5 Minnesota law established in that case, the law set forth in *Cargill* is not the law in
6 Alaska for determining when one corporate entity becomes the "instrumentality" of
7 another entity. That determination is governed by *Bendix Corp. v. Adams*, 610 P.2d 24
8 (Alaska 1980). As such, the jury instructions for this case must reflect the law as stated
9 in *Bendix*, rather than the law of Minnesota. Nugget's Proposed Jury Instruction No. 25
10 provides the proper statement of the law concerning Nugget's purported control of
11 Spencer Rock and should be given to the jury as provided.

12 **C. Prompt Payment Act**

13 In a bizarre attempt to revisit the Ninth Circuit's decision regarding Spencer
14 Rock's status as a supplier to Nugget, for the first time in the long history of this case
15 North Star has raised an issue surrounding the Prompt Payment Act ("PPA") and
16 Nugget's justified withholding of payments from Spencer Rock. North Star first
17 articulated this argument in its opposition to Nugget's Motion in Limine regarding the
18 withholding of funds from Spencer Rock. North Star has not identified just how this
19 plays a role in its current dispute against Nugget. There is no claim in the litigation
20 asserting a PPA violation (and as discussed below, there cannot be one), nor is there
21 an explanation regarding how the PPA affects any of the other claims in this litigation.
22 Yet, North Star is insisting on proffering three separate jury instructions relating to the
23 PPA, including one that defines "subcontractors." See North Star's Proposed Jury
24 Instruction Nos. 28, 28A and 29. Although this issue is addressed in Nugget's reply to
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1 the Motion in Limine, we will briefly revisit the issue and provide some additional
2 authority supporting why the PPA is a non-issue in this case.

3 North Star's purpose for raising the PPA appears to center around the notion that
4 Nugget's withholding of payments from Spencer Rock, although pursuant to the Support
5 Agreement, was somehow in violation of the PPA, and therefore, wrongful. North Star
6 relies on 31 U.S.C. § 3905(d) to argue that a prime contractor can only withhold funds
7 from a subcontractor. North Star cites no legal authority for the proposition that a prime
8 contractor cannot withhold funds from a supplier for which the prime contractor has
9 incurred costs associated with the supplier's breach. Nugget has also found no such
10 authority for this proposition, but such a narrow reading belies common sense, is
11 inconsistent with the contemporaneous interpretation by the Corps of Engineers, and is
12 not compatible with other provisions of the Act.

13 In § 3905(d), the Act states that payments may be withheld from a
14 "subcontractor" under specified circumstances. North Star attempts to apply this term
15 narrowly to mean only subcontractors as used under the Miller Act. However, within the
16 PPA, a broader definition is used. Specifically, in § 3905 (b), the term "subcontractor" is
17 modified to include "material supplier[s]." Furthermore, that the definition of
18 "subcontractor" includes "material suppliers" is confirmed by the interpretation adopted
19 in the Federal Acquisition Regulations ("FAR") relating to subcontracting policies and
20 procedures used by the Corps of Engineers. Specifically, the FAR defines
21 "subcontractor" as including "any supplier, distributor, vendor, or firm that furnishes
22 supplies . . . to or for a prime contractor." 48 C.F.R. § 44.101. The FAR also includes
23 the implementing clauses for the Prompt Payment Act for incorporation into federal
24 contracts. 48 C.F.R. §§ 32.908, 52.231-27. Thus, North Star's reliance on the PPA to
25 support its argument that Nugget's withholding of funds from Spencer was wrongful is

1 baseless. Because the PPA does not preclude Nugget's actions against Spencer Rock,
2 an interpretation supported by the Corps of Engineer's decision to continue making
3 payments to Nugget, there is no basis for including jury instructions relating to the PPA
4 or to the definition of a subcontractor.

5 Alternatively, even if North Star's interpretation of the PPA is correct and
6 suppliers are excluded from the withholding provision of §3905 (d), Nugget was
7 nevertheless entirely justified in withholding money from Spencer Rock pursuant to §
8 3905 (j), which states that §3905 shall not impair the rights available to a contractor in
9 dealing with the deficient performance of a subcontractor. Nugget's withholding of
10 funds from Spencer Rock is, therefore, wholly justified under the Alaska UCC sections
11 relating to the supply of goods. As stated in Arnavas, Government Contract Guidebook,
12 Section 26.3 (3d ed. 2006):

13 The "sales" article—Article 2—of the UCC sets forth the basic rules for
14 contracts for the sale of goods. It is intended to be the sole statement of
15 sales law for the points it actually covers. Therefore, Government
16 subcontracts—to the extent that a particular point is not preempted by the
17 federal procurement regulations—will be interpreted and enforced in
18 accordance with the UCC.

19 Section 45.02.717 of the Alaska version of the UCC provides:

20 The buyer on notifying the seller of the intention to do so may deduct all or
21 any part of the damages resulting from a breach of the contract from any
22 part of the price still due under the same contract.

23 The Support Agreement clearly notified Spencer that deductions would be made
24 to Spencer's supply contract, as did subsequent change orders and letters from Nugget
25 to Spencer.

Finally, North Star cannot attempt to expand its new PPA theories to include a
cause of action against Nugget based on an allegation that Nugget violated the PPA by
not paying Spencer Rock. As an initial matter, no such cause of action has been plead,
nor could one be inferred from any of the other causes of action in the latest amended

1 complaint. However, regardless of the status of the pleadings, the PPA does not afford
 2 a subcontractor/supplier (much less a second tier vendor) a private cause of action
 3 against a contractor for non-payment. *Virginia Beach Mechanical Services, Inc. v.*
 4 *SAMCO Construction Co.*, 39 F.Supp. 661, 676-78 (E.D. Vir. 1999). In *SAMCO*, the
 5 court found that § 3905 (i) specifically precludes the United States from being a party to
 6 claims for late payment and interest between a contractor and a subcontractor. § 3905
 7 (i), states:

8 A dispute between a contractor and subcontractor relating to the amount
 9 or entitlement of a subcontractor to a payment or late payment interest

10 penalty under a clause included in a subcontract pursuant to section (b) or
 11 (c) of this section does not constitute a dispute to which the United States
 12 is a party. The United States may not be interpleaded in any judicial or
 13 administrative proceeding involving such a dispute.

14 Because a Miller Act claim is brought in the name of the United States, the
 15 *SAMCO* court held that claims for non-payment under the PPA cannot be brought in a
 16 suit involving the Miller Act. Given this holding, it is highly questionable whether North
 17 Star's present claims based on Nugget's non-payment to Spencer Rock (equitable
 18 subordination and unjust enrichment) are cognizable, as North Star's argument is that
 19 Nugget's withholding was wrongful under the PPA.

20 **D. North Star's Tortious Interference Claim and Contract Claims Are**
 21 **Mutually Exclusive**

22 North Star has alleged alternative clauses of action against Nugget. First and
 23 foremost, North Star alleges that there was a direct contractual relationship, either
 24 express or implied, between it and Nugget. If such a relationship is found to exist, then
 25 North Star is entitled to breach damages from Nugget, which makes North Star whole
 with regard to its contract with Spencer Rock. However, if there is a direct contractual
 relationship between Nugget and North Star, Nugget could not be guilty of tortiously

1 interfering with its own contract. *Transamerica Premier Ins. Co. v State, Dept of*
2 *Natural Resources*, 856 P.2d 766 (Alaska 1993) (breach claims sound in contract and
3 not tort); *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 703 (Alaska 2003) . Thus, if
4 North Star prevails on its contractual claims, its tort claim necessarily fails.

5 Based on this, Nugget seeks the inclusion of an "either/or" sentence in the
6 instructions to the jury on the Intentional Interference with Contracts claim (Nugget's
7 Proposed Jury Instruction No. 37). Nugget's proffered sentence reads: "North Star can
8 only make this claim if you find that Nugget did not have an implied contract and is not
9 legally responsible for the acts of Spencer Rock Products." North Star has refused to
10 accept such a sentence, although it acknowledges that the contract and interference
11 with contract claims are mutually exclusive (North Star's Proposed Jury Instruction No.
12 37). North Star may potentially recover against Nugget in contract or tort, but not both.
13 *Transamerica Premier Ins. Co. v State, Dept of Natural Resources*, 856 P.2d 766
14 (Alaska 1993).

15 There is also a disagreement regarding the proper instruction relating to when a
16 party's actions justify interfering with a contract or a prospective economic advantage.
17 The problem with the pattern instruction is that it is vague with respect to the key issue
18 to be decided – i.e., what is the legal interest being protected by the alleged interferer?
19 There is nothing in the pattern instruction, or in the Alaska cases discussing this issue,
20 that requires a narrow definition of what legal interest is being protected. *See Bendix v.*
21 *Adams*, 610 P.2d 24 (Alaska 1980); *Alyeska Pipeline Service Co. v. Aurora Air Service,*
22 *Inc.*, 604 P.2d 1090, 1094 (Alaska 1979). The Comment to the pattern instruction
23 explains that: "The type of interest that a defendant is justified to protect through
24 interfering with another's contract, however, must be a "direct financial interest," as
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1 distinguished from a commercial interest which the defendants may have in the contract
2 of a competitor.” Alaska Pattern Jury Instruction 19.03.

3 North Star’s version of the instruction places the alleged contract between
4 Nugget and North Star as the financial interests Nugget is entitled to protect (North
5 Star’s Proposed Jury Instruction No. 39). Nugget is not sure how this item plays into the
6 question of whether Nugget was legally justified in moving the barge loading to another
7 dock to mitigate its losses, which precluded North Star’s continued efforts to load the
8 barge. As indicated above, if there is a contract between Nugget and North Star, there
9 can be no tortious interference. Nonetheless, Nugget’s financial interests went beyond
10 North Star’s asserted interest.

11 It was the financial implications relating to Nugget’s performance of the Homer
12 Spit Revetment contract with the Corps of Engineers that Nugget was seeking to protect
13 by mitigating the damages incurred by waiting for access to the Alaska Railroad dock.
14 Alternatively, it could be stated that Nugget was looking out generally for the company’s
15 overall financial interest in attempting to mitigate the losses it was suffering due to
16 Spencer Rock’s breach. Thus, Nugget’s interest in the financial performance of its
17 contract with the Corps of Engineers is the type of “direct financial interest” covered by
18 the pattern instruction (Nugget’s Proposed Jury Instruction No. 39). See Restatement
19 (Second) Torts § 767, comment (d) (“if there is no desire at all to accomplish the
20 interference and it is brought about only as a necessary consequence of the conduct of
21 the actor engaged in for an entirely different purpose, his knowledge of this makes the
22 interference intentional, but the factor of motive carries little weight toward producing a
23 determination that the interference was improper.”)

24 Once a legally justified interest is identified, the only question is whether
25 Nugget’s motives were malicious. There is no evidence in this case that Nugget acted

1 for any purpose other than to mitigate its losses on the Homer Spit Revetment project.
2 Nugget's proposed instruction properly sets forth the test for determining whether
3 Nugget was legally justified in interfering with the Spencer Rock – North Star contract
4 and should be given to the jury.

5 Dated: July 30, 2007

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8 United States Fidelity and Guaranty Company

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P-TRK Trial Brief (final) 073007 993100002.doc